No. 90-959

IN THE

Supreme Court of the United States

October Term, 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF, AND REPLY BRIEF TO BRIEFS IN OPPOSITION

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LIST OF PARTIES

There are no additions to the list of parties set forth in the petition for a writ of certiorari. Rule 29.1.

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Cases:

Statutes:

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Petitioners submit this (1) Supplemental Brief, and (2) Reply brief to Briefs in Opposition, filed by the Federal Respondents (Govt. Br.), and jointly by respondents Chicago & North Western Transportation Company and Chicago-Chemung Railroad Corporation (C&NW Br.).

1. **Supplemental Brief.** Subsequent to the filing of the Petition, the Interstate Commerce Commission (ICC) on January 23, 1991, issued a decision in an abandonment exemption proceeding, in which oral public hearings were held by the agency at Reno, Nevada. ICC Docket No. AB-12 (Sub-

No. 124X), *Southern Pacific Transportation Company — Abandonment Exemption — In Mineral County, NV,* decided January 16, 1991 (not printed). (*SP Abandonment-Nevada*). The Nevada Legislative Director for the United Transportation Union (UTU) filed a protest and testified at the hearing. However, in its decision served January 23, 1991, the ICC ruled that the UTU lacks standing to oppose an abandoment on the merits, citing the decision below:

> "Moreover, UTU-Local lacks standing to oppose the abandonment on the merits. *See Simmons v. ICC,* 900 F.2d 1023, *reh'g* and *reh'g en banc* denied, 909 F.2d 186 (7th Cir. 1990)."

SP Abandonment-Nevada at p. 7, n.17. Ten copies of the ICC's decision have been lodged with the Clerk.

The ICC has made the instant proceeding the basis for denying UTU participation in rail abandonment cases. This further demonstrates the importance of the proceeding to the day-to-day administration of the Interstate Commerce Act.

1. **Reply Brief.** Certain arguments have been raised by the Govt. for the first time. The Govt. asserts that petitioner UTU contends the court of appeals erred in holding that the interest of rail employees in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act (Govt. Br. 8), and that UTU does not contend that a "zone" inquiry is unnecessary here. (Govt. Br. 9).

UTU's position is that the issue below should have been whether UTU's interest in employee job protection is so "marginally related" or "inconsistent" with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit review. (Pet. 16). The statutory provisions for deciding the merits of both line spin-offs (49 U.S.C. 10901), and line abandonments (49 U.S.C. 10903),

speak only of "public convenience and necessity." The "zone of interests" inquiry is "arguably" whether the interest is to be protected or "regulated" by the involved statute.[1] The employment interest of railroad workers is part of the "public convenience and necessity." *I.C.C. v. Railway Labor Ass'n.*, 315 U.S. 373, 376-78 (1942); *United States v. Lowden*, 308 U.S. 225 (1939). Indeed, the ICC itself, after Congress in 1958 gave the agency added jurisdiction over passenger train abandonments, acknowledged that the impact upon rail employment is an issue on the merits of the "public convenience and necessity." *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59, 74 (1959):

> We agree with the employees that, in determining whether or not operation of the train is required by the public convenience and necessity, consideratаion should be given to the probable effect which discontinuance of the train will have upon employees. That the term "public convenience and necessity is broad enough to embrace consideration of the interests of employees is clear from the decision of the Supreme Court in *Interstate Commerce Commission v. Ry. Labor Executives' Assn.* 315 U.S. 373.

See also: Illinois Commerce Commission v. United States, 347 F.Supp. 1217, 1219-20 (N.D. Ill. 1971) (three judge).[2]

In short, the interest of rail employees is not so "marginally related" or "inconsistent" with the statutory purpose, to

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[1]Somehow, the court below and the Govt. have ignored the "arguably" or "regulated" language of *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970) and *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396, 397 (1987).

[2]Until 1975, ICC orders were reviewed by three-judge district courts, with direct appeal to this Court. 88 Stat. 1917-18.

infer Congress intended to deny standing to rail employees, in spin-offs and abandonment cases. Transportation Act of 1920, and the many thousands of administrative proceedings and appeals to the courts thereafter, have long since settled any "zone of interests" test for railway labor in the area of line abandonments, mergers, line sales and the like. 909 F.2d at 191. (Pet. 13a).

Decisions of Other Circuits. The Govt. asserts that only decisions by the Seventh Circuit are listed in support of the contention by dissenting Judge Cudahy that this is the first known instance where standing has been denied to railroad labor in proceedings in which job elimination is a consideration. (Govt. Br. 15-16 & n.10).

Court decisions involving railway labor suits to set aside ICC orders on the merits are numerous. Two fairly recent opinions in the D.C. Circuit come to mind: *Simmons v. ICC*, 716 F.2d 40 (1983), and *Simmons v. ICC*, 757 F.2d 296 (1985). *See also: McGinness v. ICC*, 662 F.2d 853 (D.C. Cir. 1981); *Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982); *Black v. ICC*, 762 F.2d 106 (D.C. Cir. 1985); *Simmons v. ICC*, 829 F.2d 150 (D.C. Cir. 1987); *ICG Concerned Workers Ass'n v. U.S.*, 888 F.2d 1455 (D.C. Cir. 1989); *Black v. ICC*, 837 F.2d 1175 (D.C. Cir. 1988).

Two decisions in the Eighth Circuit are: *Winter v. ICC*, 851 F.2d 1056 (8th Cir. 1988), *cert. den.* 488 U.S. 925; *Brotherhood of Ry. Carmen (Div. of TCU) v. ICC*, 917 F.2d 1136 (8th Cir. 1990). *See also: Sludden v. United States*, 211 F.Supp. 150 (M.D. Pa. 1962) (three judge).

Shipper Injury. The Govt. argues that the court of appeals correctly concluded that reversal of the ICC's abandonment decision would not remedy the alleged injury and restore service, and that such fact-bound ruling does not merit review.

(Govt. Br. 17). The Govt. has misapprehended our contention, and would ignore the real world as well. The *Abandonment* of the middle Chemung-Poplar Grove segment, together with *Acquisition* of the eastern Harvard-Chemung segment, puts the western Poplar Grove-So.Beloit segment at risk. This was recognized by two of the five ICC commissioners. (Pet. 61a-62a, 72a-73a). Indeed, these shipper petitioners (along with Dean Foods Company) were participants in the *Acquisition* proceeding (Pet. 5), and petitioner McLay Grain Company sought to intervene in the *Acquisition* case below. (Pet. 27a-28a).

C&NW Brief. The C&NW brief purports to deal with the merits of the ICC's decisions, and contains many misstatements, which need not be answered at this point. We point out that the court of appeals, contrary to C&NW's brief (C&NW Br. 6, 11), did *not* rule that substantial evidence supported the ICC's decisions. 909 F.2d at 189 (Pet. 7a); 900 F.2d at 1026 (Pet. 23a).

Respectfully submitted,

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